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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JOSUE H.,

a Person Coming Under the Juvenile Court  
Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSUE H.,

Defendant and Appellant.

B219076

(Los Angeles County  
Super. Ct. No. FJ45837)

APPEAL from an order of the Superior Court of Los Angeles County, Robin Miller Sloan, Judge. Affirmed as modified.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven E. Mercer and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Josue H., minor, appeals from the juvenile court's order declaring him a ward of the court and placing him into the camp community placement program. We conclude the evidence is sufficient to support the findings he made a criminal threat, engaged in attempted extortion, and committed the crimes for the benefit of a criminal street gang. However, we agree with the minor the court erred by imposing separate punishment for the two offenses in violation of Penal Code section 654.<sup>1</sup> We modify the disposition order to reflect a stay of those terms of confinement. In all other respects, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### ***A. Juvenile Court Proceedings***

On July 14, 2009, a Welfare and Institutions Code section 602 petition was filed alleging the minor, then 16 years old, had committed one count of possession of a firearm by a minor, a felony, and one count of possession of live ammunition by a minor, a misdemeanor. The juvenile court sustained both counts following a jurisdiction hearing on August 4, 2009.

A second Welfare and Institutions Code section 602 petition was filed on August 20, 2009, alleging the minor had committed one count of making a criminal threat, a felony, and one count of attempted extortion, a felony. As to both counts, the petition specially alleged the minor had committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)).<sup>2</sup> Following a jurisdiction hearing on

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> For simplicity, this opinion uses the shorthand phrase “to benefit a criminal street gang” to refer to crimes that, in the statutory language, are committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

September 10, 2009, the juvenile court sustained both counts and gang enhancement allegations without making express findings. At the combined disposition hearings the same day, the court declared the minor a ward of the court and the offenses to be felonies. The court ordered the minor into the camp community placement program for a period of six months, and calculated the maximum theoretical term of confinement as eight years, six months.

## ***B. Jurisdiction Hearing on the Second Petition***

### **1. The victim's testimony**

One morning in June 2009, Miguel Balbuena (Balbuena) was working at the take-out window of Tom's Burgers restaurant on the corner of Vermont Avenue and 42nd Street in Los Angeles. Balbuena was approached at the window by Luis Villagran (Villagran), the minor, and one or two other Hispanic males. Balbuena recognized all of them, having seen them together daily outside his restaurant.

Villagran identified himself and his companions as belonging to the Villains 13 gang, a branch of the Mexican Mafia. Villagran demanded Balbuena pay them a monthly rent of \$300 or they would kill Balbuena or his family. Frightened, Balbuena immediately telephoned police. When officers arrived, all but one of the males had left.<sup>3</sup> No arrests were made.

About one week later, Villagran, the minor, and the other males returned to Tom's Burgers restaurant. Villagran again spoke to Balbuena at the take-out window, while his companions "stayed behind." At some point, the minor and the other males stood on the corner about 27 feet away, "facing all over." Villagran said after contacting police, Balbuena now had to pay \$1,500 in monthly rent to avoid any harm to himself or to his

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<sup>3</sup> Both the minor and the People interpret the record as reading all of the males, except Villagran, fled from the restaurant. However, Balbuena merely testified, "Only one of them was there [when police arrived]," without identifying Villagran or anyone else.

family. Villagran then pushed himself half-way through the window and into the restaurant before Balbuena's employee pulled him out. Balbuena telephoned police. The minor and the other males standing on the corner saw the patrol car arrive and fled in different directions. When police pulled up, Villagran was sitting at an outside table. Balbuena never paid Villagran any money.

## **2. The gang expert's testimony**

Los Angeles Police Officer Guillermo Espinoza testified as a gang expert on behalf of the People. A four-year veteran of the police force, who grew up with gang members and was exposed to the gang culture, Officer Espinoza had been assigned to the Southwest gang enforcement detail for nearly two years where his primary duties were to gather gang intelligence, document gang members and investigate gang-related crimes. One of the gangs Officer Espinoza was responsible for monitoring was Street Villains 13, of which there are about 89 members, 20 to 30 of whom are active members.

In Officer Espinoza's opinion, the minor was an active member of Street Villains 13. Officer Espinoza explained he had had 10 to 15 personal contacts with the minor prior to the alleged offenses during which the minor admitted his gang affiliation. The minor's gang moniker was "Menace." Officer Espinoza was shown a photograph of the minor standing in an alley. Officer Espinoza testified the alley was located just east of the Tom's Burgers restaurant and inside Street Villains 13 territory. The alley was a common "hangout" for Street Villains 13 members and was spray-painted with graffiti denoting the gang. In the photograph, the minor was using hand signs and displaying tattoos showing his membership in Street Villains 13.

Officer Espinoza testified Street Villains 13 is a Hispanic gang allied with the Mexican Mafia, a prison gang.<sup>4</sup> To secure protection when imprisoned, members of

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<sup>4</sup> Espinoza testified the "13" in "Street Villains 13" signified the letter "M," the thirteenth letter of the alphabet. In Spanish, the letter "M" is pronounced "E-M-E," which gang members interpret as an abbreviation for "El Mexican[o] [E]ncarcelado" or the "Incarcerated Mexican."

Street Villains 13 and other Mexican Mafia-affiliated gangs were expected to pay a tax to the Mexican Mafia. The source of this tax was the proceeds from various criminal enterprises, among them extortion. According to Officer Espinoza, the other primary criminal activities of Street Villains 13 were robberies, criminal threats, attempted murders, drive-by shootings and vandalism.

Officer Espinoza also reviewed for the court minute orders memorializing the criminal convictions of two admitted members of Street Villains 13. The first related to the February 9, 2009 conviction of Michael Gonzalez Aguirre for making a criminal threat. Officer Espinoza had assisted in the police investigation and arrest of Aguirre and had personal knowledge Aguirre was a member of Street Villains 13. The second concerned the November 16, 2007 conviction of Roberto Perez for carrying a loaded firearm. Officer Espinoza knew Perez was a member of Street Villains 13 and learned from Perez about the conviction.

Officer Espinoza opined the offenses in this case were committed to benefit a criminal street gang based on facts, including several male Hispanics identified as Street Villains 13 gang members repeatedly threatening a restaurant owner with harm if he did not pay them money. The crimes benefited Street Villains 13 because the “rent” or extortion money would be used to pay the tax owed to the Mexican Mafia, as well as to fund the gang’s own criminal enterprises, to instill fear in the community, and to enhance the gang’s reputation for violence among rival gangs.

## **DISCUSSION**

### ***Substantial Evidence Supports the Juvenile Court’s Findings***

#### **1. Standard of Review.**

“The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction.” (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605; *In re Michael M.* (2001) 86 Cal.App.4th 718, 726.) In either case, “we review

the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

**2. There is sufficient evidence the minor aided and abetted the commission of making a criminal threat and attempted extortion.**

A person aids and abets the commission of an offense “when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.” (*People v. Beeman* (1984) 35 Cal.3d 547, 561; see *People v. Perez* (2005) 35 Cal.4th 1219, 1225.) “Whether a person has aided and abetted the commission of a crime is a question of fact, and on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment.” (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

The elements of aiding and abetting may be determined from a variety of factors, including presence at the scene of the crime, companionship, conduct before and after the offense and flight. (*In re Juan G.*, *supra*, 112 Cal.App.4th at p. 5; *People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409; *In re Lynette G.*, *supra*, 54 Cal.App.3d at p. 1094.) Although proof of only one of these factors, standing alone, may be insufficient to establish the defendant aided and abetted the commission of a charged offense (see *Campbell*, at p. 409 [presence or prevention]; *People v. Abilez* (2007) 41 Cal.4th 472, 521 [flight]), in combination these factors can certainly constitute sufficient evidence to support such a finding.

For example, in *In re Juan G.*, this court held the juvenile court had reasonably inferred the minor knew of, and shared, the perpetrator's criminal intent and aided and abetted the commission of a robbery, rejecting the minor's claim he was "simply an 'innocent, passive, and unwitting bystander'" during the robbery." (*In re Juan G.*, *supra*, 112 Cal.App.4th at p. 5.) The victim had been approached by the minor and perpetrator together. (*Id.* at p. 3.) When the perpetrator demanded money from the victim at knifepoint, the minor was beside him. The victim was afraid of being stabbed by the perpetrator, but also felt threatened by the presence of the minor, who was standing one foot away. (*Ibid.*) Following the robbery, the perpetrator and the minor fled and were found and arrested together. (*Id.* at p. 4.) We determined, because the minor "was present at the robbery, standing with [the perpetrator] and the victim[,] . . . [and] in the company of [the perpetrator] immediately prior to the [attempted] robbery and during the attempted escape[.]" the finding the minor had aided and abetted commission of the robbery was supported by substantial evidence. (*Id.* at p. 5.)

The same conclusion is inescapable here. The evidence bearing on the minor's criminal intent amounted to much more than the minor's mere presence at the scene. The

minor joined Villagran in confronting Balbuena on both occasions in June 2009.<sup>5</sup> On the first occasion, Villagran told Balbuena that the minor and the other males were fellow gang members willing to carry out the threats of harm if Balbuena did not pay them money. On the second occasion, the minor initially stood behind Villagran, before ending up on the nearby corner in the role of look out. Each time police arrived, the minor fled, suggesting consciousness of guilt. Thus, the minor's presence, companionship, and conduct before and after the crimes amply supported the juvenile court's findings the minor aided and abetted the commission of making a criminal threat and attempted extortion. (See *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.)

**3. There is sufficient evidence the minor committed the offenses to benefit a criminal street gang.**

Section 186.22, subdivision (b)(1), provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished" with an enhanced sentence. The gang enhancement requires proof of two elements: (1) that the felony was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) that the defendant harbored the requisite intent. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.)

The first element of section 186.22, subdivision (b)(1), was satisfied by the minor's clear association with Street Villains 13, a criminal street gang, as demonstrated by the commission of the offenses with Villagran, who identified himself and the minor

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<sup>5</sup> On cross-examination, when Balbuena asked whether just one person (Villagran) approached, demanded payment, and made threats, Balbuena testified, "No. It's never just been one person coming up to me."

as fellow gang members at the time. “Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199 [same].)

The evidence also established the second element, the minor had the specific intent to promote criminal conduct by gang members. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 6 [statute requires specific intent to assist further, or promote criminal conduct by gang members]; *People v. Villalobos, supra*, 145 Cal.App.4th at p. 322 [same].) Criminal conduct for purposes of the section 186.22 enhancement may include criminal activity of the charged crimes. (*People v. Romero* (2006) 140 Cal.App.4th 15, 19-20; *People v. Hill* (2006) 142 Cal.App.4th 770, 774.) As discussed, there was ample evidence the minor specifically intended to assist Villagran’s criminal conduct, by standing with fellow gang member Villagran in a physical show of force towards Balbuena, and by acting as a lookout while Villagran escalated his threats and payment demand.

In addition, the finder of fact may rely on expert testimony about gang culture and habits to reach a decision on a finding as to a gang allegation. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931 [expert testimony drug offense was gang-related plus evidence defendant received permission from a gang to sell illegal drugs at a mall and admission of gang membership constituted sufficient circumstantial evidence defendant intended to benefit gang].) The circumstances of the criminal threat and attempted extortion offenses, supported by Officer Espinoza’s testimony that members of Street Villains 13 commit these particular crimes to benefit their gang by enabling it to pay a tax to the Mexican Mafia for protection, was sufficient to find true the section 186.22, subdivision (b)(1), enhancement.<sup>6</sup>

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<sup>6</sup> The minor’s reliance on *People v. Ramon* (2009) 175 Cal.App.4th 843, *People v. Ochoa* (2009) 179 Cal.App.4th 650 and this court’s decision in *People v. Albarran*

#### **4. The juvenile court's failure to stay the term of confinement for attempted extortion violated section 654.**

Section 654<sup>7</sup> prohibits multiple punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *Latimer*, at p. 1208.) On the other hand, if the

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(2007) 149 Cal.App.4th 214 is misplaced. In *Ramon*, the appellate court determined that one expert-proposed, gang-related motive of many is insufficient to support a section 186.22 enhancement. (*Ramon*, at pp. 849, 853.) In *Ochoa*, the court declined to affirm the gang enhancement, stating “there were no indications that defendant had claimed responsibility for his crimes in the name of his gang.” (*Ochoa*, at p. 656.) In contrast, the minor’s and Villagran’s gang membership, the location of the crimes, the nature of the crimes, their use of the Street Villains 13 name are unequivocal indications the criminal threat offense and attempted extortion were intended to benefit the gang. As for *Albarran*, that case did not involve an evaluation of the sufficiency of the evidence to support a criminal street gang enhancement. In fact, the trial court had granted the defendant’s new trial motion as to the gang enhancements, concluding the evidence was not sufficient to support the jury’s true findings. (The prosecutor failed to produce at trial, critical evidence that had been identified as the pretrial hearing on the defendant’s unsuccessful motion to dismiss the gang enhancements and to exclude all gang evidence from trial.) The issue on appeal was whether the trial court erred in finding the highly inflammatory gang evidence admitted to prove the subsequently dismissed gang allegations did not unfairly prejudice the defendant’s trial on the underlying charges. We held the trial court should have granted the defendant’s new trial motion in its entirety, concluding, in effect, most of the gang evidence should never have been part of the trial. (*People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 227-232.)

<sup>7</sup> Section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

defendant entertained multiple criminal objectives that were independent and not incidental to each other, he or she “may be punished for each statutory violation committed in pursuit of each objective” even though the violations were otherwise part of an indivisible course of conduct. (*Harrison*, at p. 335.) “‘The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple.’ [Citation.] ‘A defendant’s criminal objective is “determined from all the circumstances . . . .”’” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Here, the juvenile court made no explicit findings during disposition. However, the aggregated term of confinement suggests the court’s implied finding each offense was a separate act of violence with an independent criminal objective or intent. On appeal, we will sustain the court’s implied factual determination if supported by substantial evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 730; see also *People v. Blake* (1998) 68 Cal.Ap.4th 509, 512.)

The minor contends the juvenile court erred by failing to stay the term of confinement on count 2, attempted extortion,<sup>8</sup> pursuant to section 654, because his intent and objective in committing that offense and in making a criminal threat<sup>9</sup> were the same—to extort money from Balbuena.

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<sup>8</sup> Extortion is “obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . .” (§ 518.) “Fear,” for purposes of extortion, “may be induced by a threat, . . . [¶] . . . [t]o do an unlawful injury to the person or property of the individual threatened . . . .” (§ 519.) Attempted extortion punishes “[e]very person who attempts, by means of any threat, . . . to extort money or other property from another . . . .” (§ 524.) “The elements of the crime of attempted extortion are (1) a specific intent to commit extortion and (2) a direct ineffectual act done towards its commission. [Citations.]” (*People v. Sales* (2004) 116 Cal.App.4th 741, 749.)

<sup>9</sup> The offense of making a criminal threat is committed by “[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of

The evidence indisputably shows Villagran and the minor wanted money from Balbuena and their sole purpose in threatening to kill Balbuena or his family was to coerce him to surrender that money. Thus, the criminal threats were to facilitate the extortion; they were incidental to the objective of obtaining Balbuena's money, and were not motivated by an objective independent of the extortion. In short, no sufficient evidentiary basis exists to support the conclusion the minor had multiple criminal intents for counts 1 and 2. As a result, pursuant to section 654, the juvenile court erred by imposing a separate term of confinement on each count. The disposition order shall be amended to stay imposition of terms of confinement on count 2 and the attendant gang enhancement.<sup>10</sup>

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the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." (§ 422.)

<sup>10</sup> Because we conclude section 654 precluded punishment for both making a criminal threat and attempted extortion, there is no need to recalculate the maximum term of confinement to include the attendant gang enhancement, as requested by the People. (*People v. Kramer* (2002) 29 Cal.4th 720, 722 ["[w]hen a defendant is convicted of two or more offenses for which section 654 prohibits multiple punishment, the trial court must impose sentence on one of them and stay imposition of sentence for the others"]; see also Cal. Rules of Court 4.424.)

## **DISPOSITION**

The September 10, 2009 disposition order is modified to reflect a stay of the terms of confinement on count 2 and attendant gang enhancement. In all other respects, the order is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.